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IN THE

Supreme Court of the United States.

No. . OCTOBER TERM, 1949.

AMERICAN DREDGING COMPANY, CLAIMANT AND OWNER OF TUGS JAMES N. KNIPE AND ARTHUR N. HERRON,

Petitioner,

v.

UNITED STATES OF AMERICA, AS OWNER OF STEAMSHIP NORWICH VICTORY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

American Dredging Company, claimant and owner of Tugs JAMES N. KNIPE and ARTHUR N. HERRON respectfully prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit (R. 266) entered on June 27, 1949, which affirmed the decree of the United States District Court for the Eastern District of Pennsylvania in an admiralty proceeding in which said tugs were held liable *in rem* for one-sixth each of the joint damages assessed in said proceeding.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

This is a proceeding in admiralty by the United States of America, owner of the steamship NORWICH VICTORY, *in rem* against three dump scows and three tugs and *in personam* against American Dredging Company, owner of all of the said scows and tugs, for damages arising out of a collision between the steamship NORWICH VICTORY and the three scows No. 116, No. 120, and No. 122 while adrift in the Delaware River after the buoy to which they had been moored by two of the tugs had broken away from its anchor (R. 3).

Subsequently American Dredging Company, as owner of the three scows, brought another suit (No. 107 of 1947 in the United States District Court for the Eastern District of Pennsylvania) against the United States of America, *in rem* and *in personam*, under the Suits in Admiralty Act to recover for the damage to its three scows resulting from their collision with the steamship NORWICH VICTORY (R. 32-35).

Both suits were consolidated for purposes of trial, and the trial judge rendered one opinion applicable to both.

On January 16, 1947, American Dredging Company, which was engaged in the business of dredging, owned and maintained dump scows and tugs. For many years prior thereto it maintained a mooring buoy in the Delaware River about five hundred feet on the New Jersey side of the channel and about opposite Pier No. 6 of the Philadelphia Naval Base (R. 20, 232). The mooring buoy was secured in place by one hundred and seventy-five feet of 1¼-inch chain which was fastened to a five thousand pound anchor lying on the bottom of the river (R. 21, 24).

American Dredging Company was the owner of the tugs JAMES N. KNIPE, ARTHUR N. HERRON and L. Y. SCHERMERHORN, and also owned three dump scows designated as Numbers 116, 120 and 122 (R. 232).

On January 16, 1947, about 8:50 A. M., the tug JAMES N. KNIPE towed scow No. 116 to the buoy and made it fast by a steel cable about sixty feet long (R. 20, 21, 232). The No. 116 was one hundred and eighteen feet long, loaded with approximately four hundred and sixty tons of mud (R. 20, 21).

About 10 A. M. on the same day, the tug ARTHUR N. HERRON towed scows No. 120 and No. 122 to the buoy and secured the No. 122 to the outer end of No. 116 (R. 20, 232). The No. 120 was secured to the port side of the No. 122 (R. 20). Both of these scows were one hundred and forty-four feet long (R. 20). They were each also loaded with approximately one thousand and sixty-nine tons of mud (R. 20, 22, 232).

About 1 P. M. the tug L. Y. SCHERMERHORN observed the three scows adrift from their mooring and aground. The captain of the tug L. Y. SCHERMERHORN phoned this information to the office of respondent American Dredging Company (R. 22, 23, 232). At about 2 P. M. the tug L. Y. SCHERMERHORN attempted to move the scows but was unable to do so (R. 23). The captain of the tug ARTHUR N. HERRON also saws the scows aground and about 2:50 P. M. so notified the office of respondent American Dredging Company (R. 23, 232).

About 9 P. M. on January 16, 1947, the master of the tug J. H. DEINLEIN (owned by The Curtis Bay Towing Company and not involved in this litigation) was advised by radio by the master of another tug, also owned by The Curtis Bay Towing Company, that the scows were adrift in the channel (R. 233). The master of the tug J. H. DEINLEIN located the scows and notified the Navy Yard of their presence and also proceeded to Pier 96 and notified the respondent American Dredging Company that the scows were adrift (R. 227).

Shortly after 10 P. M. a Coast Guard picket boat left the Coast Guard Station with orders to find the drifting scows (R. 233). The scows were sighted, and the search-

light of the picket boat was played upon the scows (R. 233). As the picket boat approached, one very dim light aboard the scows became visible (R. 233). The picket boat circled the scows continually playing the searchlight on and around them and then headed upstream to report to its base (R. 233). A few hundred feet upstream from the scows, the captain in charge of the picket boat realized that the steamship NORWICH VICTORY, coming downstream, might hit the scows, and he tried to warn the ship of the danger by playing the searchlight on the scows and then back across the bow of the oncoming ship (R. 233). The steamship NORWICH VICTORY, however, continued on without change in course or speed and collided with scow No. 122, about ten minutes after the picket boat's searchlight was first played on the scows (R. 233).

At the time of the collision, the scows were unattended (R. 235). They were made fast to each other as above described, and the No. 116 was still attached by its cable to the buoy which drifted along with the scows, the anchor chain holding the buoy to the anchor having parted *under water* (R. 23). Part of the chain was still attached to the buoy (R. 24).

The District Court held that the steamship NORWICH VICTORY and those in charge of her were negligent in failing to have competent lookout and that those in charge of her were negligent in proceeding after having seen the searchlight of the picket boat (R. 236, 237). The District Court further held that the scows were negligent being left unattended, adrift and inadequately lighted in the middle of a busy channel at night (R. 235). It was held that the tug L. Y. SCHERMERHORN was without fault (R. 238), but that the tug ARTHUR N. HERRON and the tug JAMES N. KNIPE were at fault in negligently mooring the scows. As the basis for that finding the District Court stated that the drifting of the scows from the mooring presumptively established negligence on their part and that the presumption had not been overcome (R. 238, 239).

The District Court held that American Dredging Company as claimant and owner of the three scows and the two tugs should bear five-sixths of the joint damages (R. 240).

On June 2, 1948, an interlocutory decree was entered in conformity with the District Court's findings (R. 241).

An appeal to the United States Court of Appeals for the Third Circuit (No. 9742) was taken by American Dredging Company, claimant and owner of the tugs JAMES N. KNIPE and ARTHUR N. HERRON from that portion of the decree which held them liable *in rem* for one-sixth each of the damage sustained by the Steamship NORWICH VICTORY and the Scows No. 116 and No. 122 (R. 244, 245).

An appeal to the United States Court of Appeals for the Third Circuit (No. 9741) was also taken by the three scows Nos. 116, 120, and 122 and by the American Dredging Company *in personam* (R. 249, 250).

No appeal was taken by the United States of America.

Argument was heard on both appeals, and on June 27, 1949, the Court of Appeals entered a *per curiam* opinion applicable to both appeals affirming the decree of the District Court for the same reasons expressed by the District Court in its opinion, (R. 264) and judgment in accordance therewith was entered on the same date (R. 266).

This application for a writ of certiorari is presented to review said decision as to the liability *in rem* of tugs JAMES N. KNIPE and ARTHUR N. HERRON.*

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 27, 1949 (R. 266).

The jurisdiction of this Court to entertain this petition and to grant the same is provided by Section 1254 (1)

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* Petitioner has been informed that a petition for writ of certiorari is also being filed by American Dredging Company individually and as owner of the Dump Scows No. 116, No. 120, and No. 122.

and Section 2101 (c) of Title 28 of the United States Code and by Rule 38, par. 5 (b) of the Supreme Court of the United States.

OPINIONS BELOW.

The opinion of Judge McGranery of the United States District Court for the Eastern District of Pennsylvania, filed June 2, 1948, appears on pages 232 to 240, inclusive, of the record and is reported in 77 F. Supp. 264.

The *per curiam* opinion of the United States Court of Appeals for the Third Circuit, filed June 27, 1949, appears on pages 264 to 265, inclusive, of the record and its reported in 175 F. (2d) 556.

QUESTIONS PRESENTED.

1. Where the evidence shows that two tugs had each at different times securely moored three scows to a mooring buoy which was located outside the channel and had been owned and maintained by the respondent American Dredging Company individually for about fifty years; that the buoy was held fast by a two and one-half ton anchor to which the buoy was secured by means of a chain; that four hours after one tug had moored the first scow and three hours after the other tug had moored the other two scows, a passing tug discovered the three scows and buoy aground in shallow water, attempted unsuccessfully to move them and reported this fact to the owners of the scows and the buoy; that about an hour later the master of one of the tugs also discovered the scows and buoy aground and he too notified the owner; that eight hours later, the scows still attached to the buoy whose anchor chain had broken *under water,* were adrift in the channel and while under searchlight of a patroling Coast Guard picket boat were run into by a vessel which had failed to maintain a proper lookout;

Did the Courts-below not err in holding the two tugs liable *in rem* for a part of the damage to the vessel and the scows since there was no evidence whatsoever to show that

the scows had been improperly fastened to the buoy or that the chain of the buoy had broken through any fault of the two tugs or either of them?

2. Does the drifting of the scows, hours after mooring and still properly and securely moored to the buoy, raise a presumption of negligence on the part of the tugs when the evidence shows that the drifting was caused not by any improper mooring but by a subsequent break *underwater* in the chain which secured the buoy to a 5000 pound anchor?

3. If a presumption of negligence raised by libellant's evidence required an explanation on the part of the two tugs, was not such presumption rebutted by the facts concerning the scows, the tugs, the buoy, the moorings, etc., which were set forth in the Answers to Interrogatories which were introduced into evidence by the libellant?

4. Was not the negligence of the steamship NORWICH VICTORY, in failing to maintain a competent lookout and in proceeding at the speed it did after having been warned by the searchlight of the Coast Guard picket boat, such a proximate and intervening cause of the collision as to relieve the tugs of liability *in rem*, if any there were?

REASONS FOR GRANTING THE PETITION.

The petition should be granted because:

1. The decision of the United States Court of Appeals for the Third Circuit, in holding that the two tugs, which properly and securely moored the scows to an apparently safe berth, were liable *in rem* for damages arising out of a collision hours later and after the scows had gone adrift because of a defect in said berth, is contrary to the existing decisions with respect to the liability of tugs, and especially the decisions of the Court of Appeals for the Second Circuit and the district courts of said circuit. The *Eastchester*, 20 F. (2d) 357 (C. C. A. 2d, 1927), 1927 A. M. C. 1092, *Red Star Towing & Transportation Co., Inc. v. The Russell No. 7*, 70 F. Supp. 713 (D. C. E. D. N. Y. 1947), 1947

A. M. C. 530; affirmed 168 F. (2d) 717 (C. C. A. 2d, 1948), 1948 A. M. C. 1141; *Seaboard 16 and 21*, 1931 A. M. C. 1610 (D. C. E. D. N. Y.); *The James McCue*, 37 F. (2d) 934 (D. C. S. D. N. Y. 1930), 1930 A. M. C. 698. *West Branch*, 43 F. (2d) 834 (D. C. S. D. N. Y. 1930), 1930 A. M. C. 1298.

2. The decision of the United States Court of Appeals for the Third Circuit in affirming the decision of the United States District Court and so holding that the drifting of the scows presumptively established neglect on the part of the tugs is not supported by the decision of this Court in *The Louisiana*, 70 U. S. 164 (1865) or by the case of *McWilliams Bros. v. Davis*, 285 Fed. 312 (C. C. A. 2d, 1922) which were erroneously cited as authority for such conclusion. Each of said two cases depended upon positive evidence of neglect in mooring and not upon any presumption of negligence. Furthermore, the only other case cited by the District Court, *Pennsylvania R. R. Co. v. James McWilliams Towing Line*, 277 Fed. 798 (C. C. A. 2d, 1921), is likewise inapplicable because, although it was decided upon a presumption of negligence in an action *in personam*, the presumption arose from the fact that the tugs in that case could see and judge as to the adequacy of mooring lines with which the flotilla was fastened and were not in any way concerned with the security of the berth or buoy.

3. The decision of the United States Court of Appeals for the Third Circuit in holding that the tugs were presumptively negligent (insofar as such presumption might actually or inferentially be considered to have arisen from the contract of towage) is contrary to the decision of this Court in *Stevens v. The White City*, 285 U. S. 195 (1932) which directly holds that a tug is not a bailee of a scow so as to raise a presumption on the ground of a bailment and that a scow (which is in a much more favored position than a third party) has the burden of proof throughout the trial, unaided by any presumption, to show fault on the part of the tug.

4. If any such presumption of negligence was established by the libellant, it was rebutted by facts set forth in Answers to Interrogatories which were introduced into evidence by the libellant. *Clifton v. United States,* 4 How. 242, 246 (1846).

5. The determination of the rights and liabilities of a tug as distinguished from the respondent American Dredging Company individually, and especially the tug's liability *in rem* as distinguished from American Dredging Company's liability *in personam,* is of paramount public importance not only in the Port of Philadelphia but in all harbors in this country in which tugs ply their trade. Shipping interests at large who are vitally interested and concerned look to this Court for a determination of these questions. As stated by Judge Hand in *Waldie v. Steers Sand & Gravel Corporation,* 151 F. (2d) 129, 131 (C. C. A. 2d, 1945) 1945 A. M. C. 872, 875:

> ". . . a tug . . . must ply her trade all over the harbor, and there is ordinarily no warrant, either in principle or authority, for requiring her to sound at each wharf where she delivers a barge."

A tug should not be liable *in rem* in the absence of any evidence of negligence on her part nor should any presumption of negligence arise merely from the fact that hours after the last mooring the scows were found adrift, still properly and securely fastened to the buoy which the tugs at the time of mooring had every reason to be believe to be safe and in good condition, particularly as the respondent American Dredging Company, individually, did nothing about it and took no steps to recover the scows although it knew for about nine hours that the scows had been adrift, having twice been advised by telephone (R. 22, 23, 232, 233). Certainly the master of each tug was not required to don a diver's suit and make an inspection of all the links of the buoy's anchor chain, any more than he would have

been required to make a detailed inspection of the interior of a wharf to which he might have planned to fasten his tow.

Respectfully submitted,

AMERICAN DREDGING COMPANY,
Claimant and Owner of Tugs James N. Knipe and Arthur N. Herron.
By JOSEPH W. HENDERSON,
Of Counsel.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

JOSEPH W. HENDERSON, being duly sworn according to law, deposes and says that he is counsel for the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

JOSEPH W. HENDERSON.

Sworn to and subscribed before me this 21st day of September A. D., 1949.

ETHEL S. SMITH,
Notary Public.
(Seal)
My commission expires February 3, 1953.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

JOSEPH W. HENDERSON.
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions Below, Jurisdiction, Statement of the Case, and Questions Presented see pages 2 to 7 of the Petition.

ARGUMENT.

I. The Evidence Fails to Establish Any Negligence on the Part of Tugs Arthur N. Herron and James N. Knipe so as to Be Liable *in rem* for Damage to the Steamship Norwich Victory or the Scows.

The evidence in this case (summarized in the Statement of Matter Involved) is clear and specific with respect to the tugs, who exercised reasonable prudence and maritime skill in the mooring of the scows. The record is devoid of any evidence of negligence on the part of the tugs so as to make them, or either of them, liable *in rem* for damages arising out of the collision.

There was no evidence whatsoever that the scows were improperly moored. As a matter of fact, no such charge could have been made because the evidence is uncontradicted that as late as the time of the collision the three scows were still made fast to each other, and Scow No. 116 was still moored to the mooring buoy which was also adrift together with the scows (R. 23, 24). The only evidence as to the cause of the scows and the mooring buoy being adrift was the fact that the one hundred and seventy-five feet of anchor chain, which connected the mooring buoy to a five thousand pound anchor, had parted *under water* (R. 21-24). In fact, after the collision, this chain was still attached to the mooring buoy (R. 24).

The evidence thus shows that the two tugs had exercised reasonable prudence and maritime skill with respect to the towing and mooring of their respective tows, and that the tugs had securely fastened the scows at an apparently safe berth which had been maintained by the owner of the towed scows for a period of about fifty years (R. 21). Moreover, not only did the tugs moor the scows properly and securely, but, before proceeding upon other assignments, they remained in attendance with the scows for about ten minutes to make certain that the mooring cable had let out properly and that all lines were holding (R. 22).

It is well established that a tug fulfills its duty by mooring its tow in a berth which is apparently safe at the time of mooring. If the berth is ostensibly safe but actually has an uneven bottom of which the tug had no special or general knowledge, the tug is not liable for damage to the tow. *The James McCue,* 37 F. (2d) 934 (D. C. S. D. N. Y., 1930), 1930 A. M. C. 698. A tug leaving a barge at a spot indicated by the consignee is not liable if the berth proves unsafe at low tide. *West Branch,* 43 F. (2d) 834 (D. C. S. D. N. Y., 1930), 1930 A. M. C. 1298. *The Eastchester,* 20 F. (2d) 357 (C. C. A. 2d, 1927), 1927 A. M. C. 1092.

While it is the duty of a tug to see that its tow is made fast in a proper and safe manner and to inspect the lines so that the tow, as distinguished from the tow and berth or buoy, cannot later break loose from its mooring place, *Venus and Empire No. 5,* 6 F. Supp. 950 (D. C. S. D. N. Y. 1934), 1934 A. M. C. 397; affirmed 73 F. (2d) 1008 (C. C. A. 2d, 1934), the master of the tug is not required to *inspect the berth or dock,* at least in the absence of information requiring an inspection or investigation. *Red Star Towing & Transportation Co., Inc. v. The Russel No. 7,* 70 F. Supp. 713 (D. C. E. D. N. Y., 1947), 1947 A. M. C. 530; affirmed 168 F. (2d) 717 (C. C. A. 2d, 1948), 1948 A. M. C. 1141.

In *Doward v. Lindsay, The "William Lindsay",* L. R. 5 P. C. 338 (1873) the "William Lindsay", was moored to

an apparently safe buoy whose iron band broke during a storm. The vessel then drifted and came into collision with another vessel. The High Court of Admiralty of England in holding that the "William Lindsay" was not negligent in mooring without examining the buoy for latent defects said on pages 343 and 344:

> "It is obvious that no man, however prudent and however desirous to be on the safe side, would be able to examine these buoys, so as to discover whether there were latent defects in them or not. He must, to a certain extent, trust to the sanction which has been given to them by the authorities of the port. . . . Their Lordships think, however, upon this first question, that there was no negligence on the part of the master in mooring to the buoy, and not discovering the defect which undoubtedly led to the accident."

When the tugs JAMES N. KNIPE and ARTHUR N. HERRON had properly and securely fastened their tows to the mooring buoy, they had made such delivery as to relieve the tugs of any liabilities *in rem* for any damages which might have been caused later, or contributed to later, by the scows being found adrift in the channel. *Seaboard 16 and 21,* 1931 A. M. C. 1610 (D. C. E. D. N. Y.) This is particularly so since the evidence as to *the cause of their being adrift* was in no way related to the mooring of the scows to the buoy, but rather *was the break under water in the anchor chain which occurred sometime after the mooring and obviously was not apparent at the time when the masters of the tugs tied up the scows.* If the chain had been broken at that time, the break would have been ascertained because each tug remained in attendance about ten minutes after mooring for the specific purpose of ascertaining that everything was in good order and "all lines holding" (R. 22).

There is nothing in the record to show or to indicate that the buoy (which had been in use for over fifty years)

had ever theretofore been adrift or that the anchor chain had previously broken or was in a weakened condition. No warning was given at any time to the tugs that the buoy was defective in any way whatsover. In fact, notwithstanding the fact that the libellant, United States of America, introduced into evidence Answers to Interrogatories giving full information in Answers #3 (a), #4 (b), #4 (c), #4 (d), and #14 (b) as to the location, construction and maintenance of the buoy, the chain and anchor (R. 20, 21, 24), in Answers #1, #2, #3 and #4 (e) as to the length, size and weight of the scows which were loaded with mud (R. 20, 21, 22) and in Answer #14 of the fact that the anchor chain parted (R. 23, 24), said libellant offered no proof whatsoever as to any possible reason for the break in the chain and, more particularly, failed to show that the break resulted from any fault or neglect on the part of the tugs (R. 229, 9-14, 20-24). To find negligence here would lead to a pure speculation.

II. The Drifting of the Scows, Hours After Their Mooring and Still Properly and Securely Moored to the Buoy, Does Not Raise Any Presumption of Negligence on the Part of the Tugs.

No presumption of negligence can arise from the mere fact that three hours after the last mooring, the scows were first discovered adrift and aground (R. 22, 23, 232). The Courts-below erroneously concluded that in the absence of unusual weather conditions "the drifting presumptively establishes neglect on the part of the tugs" (R. 238).

Factually, the scows were discovered adrift three hours after the mooring of the Scows No. 120 and No. 122 and four hours after the mooring of Scow No. 116. Solely from the point of view of the period of time which had intervened between the mooring and the discovery of their being adrift, there can be no presumption that the tugs were negligent in their mooring of the scows, for during those hours many independent and unrelated factors could have intervened

which might have caused the tugs to go adrift. In addition, and irrespective of the time element, factually all the evidence indicates that the scows had been properly and securely moored, because even after the collision Scow No. 116 was still secured to the mooring buoy (R. 23). The obvious cause of the drifting of the buoy and the scows was the break *under water* of the anchor chain which was a part of the permanent equipment of the mooring buoy, owned, operated and maintained for years by American Dredging Company whose personal liability, if any, in connection with its maintenance cannot be transferred to the tugs which apparently were directed to use said buoy. In other words, the evidence shows that the tugs, instead of being negligent, performed the services required of them so well that all scows were still attached to the buoy at the time of the collision.

The cases cited by the United States District Court are not applicable.

McWilliams Bros. v. Davis, 285 Fed. 312 (C. C. A. 2d, 1922) and *The Louisiana,* 70 U. S. 164 (1865), depended upon positive evidence of neglect in the mooring and not upon the presumption of negligence. While *Pennsylvania R. R. Co. v. James McWilliams Towing Line,* 277 Fed. 798 (C. C. A. 2d, 1921), was decided upon a presumption, the facts show its inapplicability. In that case the lines by which the flotilla was fastened together broke, and, in the absence of an explanation, it was presumed that the tug had failed in its duty to see that the fastenings were sufficient to hold the complete flotilla. In that case the tugs were presumed to have overloaded the lines of the inner barge which were a part of the lines tying the flotilla and were as much a part of the mooring operation as any of the other lines. The tug not only could see these lines, but was in a position where it could judge as to the adequacy thereof. In the present case there was nothing wrong with the lines fastening the flotilla of three scows. The break occurred in the anchor line of the buoy and was *under water* and was due to a condition of which the tug had no knowledge

and was not under any duty to investigate. At best it was a hidden danger or latent defect in an instrumentality over which the tugs had no control. Certainly, the master of the tug (who is not required to make a detailed inspection of the interior of a pier to which he may fasten his tow) cannot be presumed to have been negligent for failure to make an inspection of all the links of the buoy's anchor-chain.

Not only are the cases cited by the United States District Court inapplicable, but we have found no case in which such a presumption has been binding upon tugs in a situation analagous to the facts in the present proceeding. Furthermore such a presumption would be contrary to established principles of maritime law. Even where bailed property inflicts damage on the property of a third party, a stranger to the bailment must prove negligence step by step and cannot claim the benefit of any presumption. *Burns Bros. v. Erie Railroad Company, et al.*, 79 F. Supp. 948, 951 (D. C. E. D. N. Y., 1948) 1948 A. M. C. 1161, 1166. However, this Court has held that a tug is not a bailee of a scow so as to raise a presumption on the ground of a bailment and that a scow (which is in a much more favored position than a third party) has the burden of proof throughout the trial, unaided by any presumption, to show fault, on the part of the tug. *Stevens v. The White City,* 285 U. S. 195 (1932).

III. Even if a Presumption of Negligence Be Raised by the Discovery of the Scows Adrift After Their Mooring, Such Presumption Was Rebutted by the Answers to Interrogatories Which Were Introduced Into Evidence.

Moreover, even if it be assumed (which we do not admit) that the discovery some hours later of the scows and buoy being adrift raises a presumption of negligence on the part of the tugs requiring an explanation, the Answers to Interrogatories which the libellant *introduced into evidence* rebut any such presumption (R. 20-24). The said Answers to Interrogatories disclose full information in Answers #3 (a), #4 (b), #4 (c), #4 (d), #14 (b) as to the

location, construction, and maintenance of the buoy (R. 21), in Answers #4 (c) and #14 (b) as to the length and size of the anchor chain (R. 21, 24), in Answers #1, #2, #3 and #4 (e) as to the size and weight of the scows (R. 20), in Answer #3 as to the nature and length of cable used to fasten Scow No. 116 to the buoy and size of the hawsers securing the scows to each other (R. 20, 21, 22). This evidence on its face established two facts, (1) the maintenance for years of a buoy for the very purpose for which it was used and (2) the fastening of the scows to the buoy in a proper and usual manner. The failure of the tugs to call any witnesses was not detrimental to their case, for the Answers to Interrogatories in themselves amounted to "other equivalent testimony" rebutting any presumption. While we may assume *arguendo* that such presumption when unexplained might have been as fatal as positive testimony of negligence, such presumption is not applicable where the libellant has introduced "other equivalent testimony" bearing on the question of negligence. *Clifton v. The United States,* 4 How. 242, 246 (1846).

IV. The Evidence Shows That the Negligence of the Steamship NORWICH VICTORY Was Such a Proximate and Intervening Cause of the Collision as to Relieve the Tugs of Liability in Rem, if Any There Was.

Assuming *arguendo* that the tugs were negligent with respect to the mooring of the three scows, such negligence was not the proximate cause of the collision with the steamship Norwich Victory and the tugs should not be held liable *in rem* for any damage to the steamship Norwich Victory or the scows. The evidence shows that the negligence of the steamship was the proximate cause of the collision. Shortly after 10 P. M. a Coast Guard picket boat left the Coast Guard Station with orders to find the drifting scows (R. 233). The scows were sighted, and the picket boat circles the scows, continually playing the searchlight upon them (R. 233). It then headed upstream to report to its

base (R. 233). When a few hundred feet upstream, the captain in charge of the picket boat realized that the steamship NORWICH VICTORY, coming downstream, might hit the scows and tried to warn the ship of the danger by playing its searchlight on the scows and then back across the bow of the oncoming ship (R. 233). The steamship NORWICH VICTORY, however, continued on without change in course or speed and collided with the scows about ten minutes after the picket boat's searchlight had been first played on the scows (R. 233). Clearly, the negligence of the steamship NORWICH VICTORY in failing to keep a proper lookout and in proceeding at the speed it did after having seen the searchlight of the picket boat was the proximate cause of the collision and such an intervening force as to relieve the tugs of liability, if any there might have been.

CONCLUSION.

We, therefore, submit that petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 351

AMERICAN DREDGING COMPANY, CLAIMANT AND OWNER OF TUGS JAMES N. KNIPE AND ARTHUR N. HERRON, PETITIONER

v.

THE UNITED STATES OF AMERICA

No. 352

AMERICAN DREDGING COMPANY, INDIVIDUALLY AND AS OWNER OF THE DUMP SCOWS NO. 116, NO. 120 AND NO. 122, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 232)

is reported at 77 F. Supp. 264. The opinion of the United States Court of Appeals for the Third Circuit (R. 264) is reported at 175 F. 2d 556.

JURISDICTION

The judgments of the Court of Appeals were entered on June 27, 1949 (R. 265-266). The petitions for writs of certiorari were filed on September 23, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether there was error in the concurrent findings that petitioner's tugs and scows were liable for negligence in causing the collision with respondent's vessel.

2. Whether petitioner's three scows, because they were unmanned and attached together, were either immune from liability *in rem* or subject to liability only as one.

STATEMENT

Both of these suits arise from a collision between the steamship *Norwich Victory,* property of the United States, respondent here, and three dump scows owned by petitioner, the American Dredging Company. Petitioner—as claimant and owner of the tugs *James N. Knipe* and *Arthur N. Herron* in No. 351, and individually and as owner of the dump scows in No. 352—seeks review of judgments below which affirm a decree holding the *Norwich Victory,* the scows, and the tugs alike all liable for

negligence in causing the collision. The facts are as follows:

Petitioner maintained a mooring buoy in the Delaware River located approximately opposite Pier 6 of the Philadelphia Navy Yard and 500 feet on the Jersey Side of the channel. At about 8:50 A.M. on January 16, 1947, petitioner's Dump Scow No. 116 was moored to this buoy by petitioner's tug, the *James N. Knipe.* About an hour later, the *Arthur N. Herron,* another of petitioner's tugs, moored petitioner's Dump Scows Nos. 120 and 122 to the same buoy, securing the No. 120 to the outer end and the No. 122 to the port side of the No. 116 (R. 20, 21, 232).

Some three hours later, at about 1 P.M., petitioner's tug the *L. Y. Schermerhorn* observed the three dump scows adrift from their mooring and grounded about 1,000 feet down river from Buoy No. 44, which was located approximately on a line with petitioner's buoy and the Sanitary Dock (R. 20, 22, 232). The *Schermerhorn,* at about 1:30 P.M., conveyed this information by telephone to petitioner's Camden office, and, after trying unsuccessfully to move the scows, proceeded on another assignment at about 2:30 P.M .(R. 23, 232). Some time between 1 and 3 P.M. the tug *Herron* found the tugs aground in the same location at which they were seen by the *Schermerhorn,* and also notified petitioner's Camden office of this situation (R. 23, 232-233). Like the *Schermerhorn* the *Herron* de-

parted, leaving the scows unmoored and unattended in an ebbing tide (R. 4-5, 16).

Shortly after 9 P.M. the tug *J. H. Deinlein,* (owned by another company), after being warned of the presence of the scows by a radio message from the tug *Goheen,* found them floating in mid-channel (R. 226, 233). The captain of the *Deinlein* notified the Navy Yard and the master of one of petitioner's dredges of the scows' location (R. 227-228, 233). He later testified that there were no lights on any of the scows, as did another tug captain who saw the collision (R. 223, 226).

A few minutes after 10 P.M. a Coast Guard picket boat left the Coast Guard Station "with orders to find some drifting barges and report back to the base" (Finding 5, R. 233). Proceeding down the river, this boat sighted the scows when they were about 200 yards away. The scows appeared at first to be wholly without lights; then, when the picket boat moved closer a single very dim light became visible. (R. 233.) Playing its searchlight on the scows, the picket boat circled them for a while, then started back to make its report (R. 233). After proceeding to a point a few hundred feet upstream from the scows, it sighted a steamship moving down the river (R. 141, 233). This was the *Norwich Victory,* which had gotten under way at 10:04 P.M. from a point about 2½ miles upstream and was traveling at a speed of about 12 knots (R. 233-234). The picket boat's light had been seen

some ten minutes earlier from the *Norwich Victory,* but no significance had been attributed to it (R. 234). Now, realizing the possibility of collision, the picket boat sought to give warning by playing its searchlight across the steamship's bow and on the scows (R. 142, 233). But the *Norwich Victory,* holding its course and speed, collided with Scow No. 122, which became impaled on the steamship's bow and was driven into Scow No. 116. The ship and both scows suffered damage. Scow No. 120, though it had been lashed to the other two, escaped injury. (R. 18, 19, 233, 235.)

Libels were filed by both the United States, as owner of the *Norwich Victory,* and the American Dredging Company, as owner of the three scows. The libel of the United States named as respondents, in addition to the Dredging Company and the scows, the tugs *Schermerhorn, Herron,* and *Knipe.* (R. 3-9, 32-35.) Both suits were consolidated, tried on depositions, and submitted upon pleadings and proofs (R. 232).

Holding that the only duty of the *Schermerhorn* upon finding the scows adrift was to inform their owners, the district court absolved this tug of fault (R. 238). The tugs *Herron* and *Knipe,* however, were found to have been negligent in mooring the scows. The court pointed out that the scows had been found adrift within three or four hours of their mooring, that there had been no unusual weather to cause their unmooring, and that petitioner had

"not produced any evidence by the important witnesses who might [have] overcome" the resulting presumption that the tugs had neglected their duty to moor the scows securely (R. 238-239). The court also concluded that the scows, which had been "left unattended, adrift, and inadequately lit in the middle of a busy channel at night," were clearly liable (R. 235). And the *Norwich Victory,* after a review by the court of the testimony of its personnel, was likewise held to have been at fault for failing to maintain a proper lookout and for failing to take earlier precautions against accident (R. 236-238). In this connection, the court rejected petitioner's contention that the negligence of the *Norwich Victory* was such that the fault of the scows could not be regarded as having caused the collision. While the picket boat's light had been misunderstood, the court concluded that "three proper lights on the three scows probably would not have been" (R. 235). Finally, having found negligence on the part of six vessels, the court decreed that they should each bear one-sixth of the joint damages (R. 239-240).

The court below, after a *de novo* consideration, affirmed the conclusions and decree of the district court (R. 264-265).

ARGUMENT

1. Petitioner attacks in several respects the factual determinations of the courts below. This Court has repeatedly declared, however, that certi-

orari will not issue "merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178, and cases there cited. Here, the evidence has been independently examined by two courts, the inquiry of the court below being *de novo* (R. 264-265). And the concurrent findings of these courts, far from being "plainly without support" (*General Pictures Co.* v. *Electric Co., supra,* at 178), are wholly sustained by the record.[1]

a. In No. 351, petitioner urges (Pet. 13) that when the tugs *Knipe* and *Herron* "had properly and securely fastened their tows to the mooring buoy, they had made such delivery as to relieve the tugs of any liabilities *in rem* for any damages" resulting from the later drifting of the scows. But the quoted language merely contradicts the conclusion of fact, reached by both courts below, that the scows were *not* "properly and securely fastened." Those courts agreed on the well settled proposition that, where, as here, vessels are adrift shortly after their mooring and there are no unforeseeable circumstances of weather or tide to explain the drifting, those responsible for the mooring must overcome the natural inference that they were negligent. *The Louisiana,* 3 Wall. 164, 173-174; *Pennsylvania R. Co.* v. *James McWilliams Towing Line,*

[1] The "two-court rule" applies in admiralty, as in other cases. *Mahnich* v. *Southern Steamship Co.*, 321 U.S. 96, 98-99; *Just* v. *Chambers*, 312 U.S. 383, 385.

277 Fed. 798, 799 (C.A. 2); *The Chickie,* 141 F. 2d 80, 82 (C.A. 3); *The Anaconda,* 164 F. 2d 224, 228 C.A. 4). Petitioner, which saw fit to call witnesses from the Coast Guard's picket boat (R. 122-153) and from the passing tug *William Cramp* (R. 214-224), produced not a single witness from among its employees who were in a position to testify as to the manner in which the mooring had been accomplished. Now it contends in effect (No. 351, Pet. 11-13) that its answers to respondent's interrogatories (R. 23-24)—answers supplied on the "knowledge, information and belief" of petitioner's Secretary (R. 24)—stating that Scow No. 116 was still attached to the buoy after the collision, show that the mooring was proper and that the fault lay in the buoy. But this effort to excuse the tugs, given the highly questionable status of petitioner's self-serving answers to interrogatories as "evidence", was reasonably rejected as inadequate. A failure, like the one here, to call witnesses in a position to know the facts has long been recognized to warrant the inference that the testimony of such witnesses would have been unfavorable. *Clifton* v. *United States,* 4 How. 242, 246-247; *The New York,* 175 U. S. 187, 204-205; *The Eastchester,* 20 F. 2d 357 (C.A. 2).[2]

[2] The cases cited by petitioner as being "contrary" to the decision below (No. 351, Pet. 7-8) are shown by petitioner's own discussion of them (Pet. 12, 13, 16) to cast no doubt on the correctness of the conclusion that the tugs were negligent. These cases (1) hold that a tug fulfills its duty when it moors a tow securely in a berth which it reasonably considers safe

b. Equally unimportant and insubstantial is the contention (No. 351, Pet. 17-18) that the negligence of the tugs was not a proximate cause of the collision. Like the question of negligence, the determination of proximate cause is a factual problem. *Milwaukee & St. P. Ry. Co.* v. *Kellogg*, 94 U. S. 469; cf. *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 483. Respondent does not question here the finding that the *Norwich Victory* was negligent. In this case, as in every case where more than one vessel is negligent, it is arguable that the collision could have been avoided by faultless behavior on the part of one. But the contention that the negligence of the *Norwich Victory* was such an intervening factor as to exonerate the tugs was examined and rejected below. Given the circumstances—negligent mooring resulting in the drifting in mid-channel of unlighted scows—this conclusion would hardly appear to require detailed justification here.

c. In No. 352, the specification of errors and argument in the brief supporting the petition (Pet. 8, 9-11) present the contention that, because the initial impact of the collision was between the

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or of which the potential dangers are the responsibility of another; and (2) refuse to hold a tug liable as a bailee for delivering a tow in damaged condition where there is no evidence that the injury is the result of the tug's negligence (*Stevens* v. *The White City*, 285 U.S. 195). In the case at bar, (1) there was no showing that the tugs had moored the scows securely; and (2) the holding that the drifting of the scows "imposed upon the tug the duty of proving that the proper care was exercised * * * [was] merely the application in admiralty of the well known rule of res ipsa loquitur." *The Anaconda*, *supra*, at 228.

Norwich Victory and Scow No. 122, Scows No. 116 and No. 120 were improperly held liable for being unlighted, unattended, and adrift.[3] As to the No. 116, this argument seems particularly ill-conceived. This scow was damaged in the collision (R. 235). Petitioner sought recovery for these damages (R. 35), which obviously had to be added to the total to be apportioned. The damages to the No. 116 flowed directly from the fact that it was negligently permitted by petitioner to drift unattended for some nine hours prior to the collision.

Apart from this objection, however, petitioner concedes (Pet. 9-10) that the Scows No. 116 and 120 were under a statutory duty to carry lights, and does not question here the finding that they were unlighted. The district court expressly considered this Court's direction to the Court of Appeals in *The Eugene F. Moran,* 212 U. S. 466, 476, to examine the question "whether the duty to give warning by a light was imposed upon [a scow tied to another] for any other purpose than to prevent collision with itself." And it concluded "that the duty imposed upon each of these Scows was, under the circumstances of the instant case, to protect all three from collision with any one of them." (R. 240.) In *The Eugene F. Moran, supra,* the Court of Ap-

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[3] Since "the supporting brief is not a part of the petition, at least for the purpose of stating the questions on which review is sought" (*General Pictures Co.* v. *Electric Co.*, 304 U.S. 175, 178), it would appear to be doubtful whether this question is properly presented for review. Cf. *National Licorice Co.* v. *Labor Board,* 309 U.S. 350, 357.

peals, considering the same problem on remand, reached the same conclusion, 170 Fed. 928 (C.A. 2), and this Court denied certiorari, 215 U. S. 596. The identical result below presents equally slight basis for review. Where, as here, vessels "at the time of a collision [are] in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributory cause of the disaster." *The Pennsylvania,* 19 Wall. 125, 136.

2. Petitioner contends, finally, that, since the scows had no crews and were tied together, *in rem* liability could not attach to them at all; or if it could, that the three scows should be counted as one for the purpose of assessing their liability. The first of these suggestions —no *in rem* liability—petitioner supports by discussing at length cases where towed vessels were in charge of tugs and where the negligence of the tugs resulted in injury to third parties. In this case, however, apart from the initial negligence of the tugs, the scows were permitted by petitioner to drift, unlighted and unattended, for eight or nine hours. The scows were "negligent" in the only sense in which the admiralty ever condemns an inanimate vessel as negligent; namely, in that those responsible for them failed to exercise due care to avoid their injuring others. This Court long ago laid down the principle that "vessels are held liable for damage occasioned by collision * * * on ac-

count of the culpable neglect or complicity, direct or indirect, of their owners * * *." *The Continental,* 14 Wall. 345, 354; *Sturgis* v. *Boyer,* 24 How. 110, 123. Accordingly, where owners or their agents have been negligent in permitting their vessel to injure others, the fact that it was unmanned at the time has not prevented the imposition upon it of *in rem* liability for resulting injuries to other vessels. *The D., L. & W. No. 442,* 30 F. 2d 250 (C.A. 2), certiorari denied, 279 U. S. 854; *The Sadie,* 57 F. 2d 908 (S.D.N.Y.), affirmed, 62 F. 2d 1076 (C.A. 2). Any other result would make the personification of a vessel as a "wrongdoer" a painful artificiality wholly divorced from its essential practical purpose as a security device.

Like the faulty analysis of *in rem* liability upon which it is based, petitioner's contention that the three scows should be counted as one in apportioning liability is without merit. This contention, though urged by petitioner as making this "a case of extraordinary and exceptional circumstances" (No. 352, Pet. 7), is actually refuted by this Court's decision in the precisely analogous case of *The Eugene F. Moran,* 212 U. S. 466. (And see *The Kookaburra,* 69 F. 2d 71 (C.A. 2); *The Socony No. 123,* 78 F. 2d 536 (C.A. 2).) There, two scows, tied together, were each held separately liable for failure to carry proper lights. The very argument urged here—that vessels tied together should be treated as a unit—was rejected. 212 U. S. at 475.

As this Court pointed out, "If the second scow had been owned by another it would have had to pay its share." *Ibid.* Nor was the result determined by the fact that the scows were manned. In that case, as in this one, the point of importance was that the faults of the scows in failing to show lights "were several." *Ibid.*

CONCLUSION

The decision below is clearly correct and there is no conflict of decisions. It is respectfully submitted that the petitions for writs of certiorari, which raise no question of general importance, should be denied.

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